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IN THE

Supreme Court of the United States

October Term, 1968.

No. 467

DAVID JUAIRE,

Petitioner,

vs.

WALTER MARSHAK, INC.,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

ALBERT AVERBACH,
Attorney for Petitioner,
50 Broadway,
New York, N. Y. 10004

On the Petition:
SOL LEFKOWITZ,
PIERRE LORSI.

THE REPORTER COMPANY, INC., New York, N. Y. 10007—212 RE 2-6976—1968

Table of Contents.

	Page
Opinion Below	1
Jurisdiction	1
Questions Presented	2
Statutes Involved	3
Statement of the Case	4
Reasons to Allow Writ	7
APPENDIX:	
Police Report of Motor Vehicle Accident	10
Opinion	12

Table of Cases.

	Page
Chapman v. California, 386 U. S. 24	3
Gencarella v. Fyfe, 171 F. 2d 419	7
Hoffman v. Palmer (1942), 318 U. S. 109	2, 8
N. Y. Central R. R. Co. v. Johnson, 279 U. S. 310 at 318	2, 8
Yates v. Bair Transport, Inc., 249 F. Supp. 681 (S. D. N. Y. 1965)	7

Statutes.

28 U. S. C.:	
Section 1254(1)	1
Section 1732	3, 8
Section 2111	3, 8

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vs.

WALTER MARSHAK, Inc.,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

David Juaire, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case on June 4, 1968.

Opinion Below.

The opinion of the Court of Appeals for the Second Circuit is not yet officially reported and is printed in the Appendix.

Jurisdiction.

The judgment of the Court of Appeals was entered on June 4, 1968. The jurisdiction of the court is invoked under 28 U. S. C. §1254(1).

Questions Presented.

I. What are the rules for admitting a police report of an accident into evidence, when it contains information garnered from others?

The police report, printed in the Appendix, contains statements that petitioner was "crawling in roadway," "had been drinking" and therefore he had his ability "impaired."

Even though there was no testimony that petitioner was "crawling" or that he was drunk, the Court of Appeals held it proper to admit the report as a business record. The Court further held even if it was in error, the error was harmless.

The Court thus held even though the jury interrupted its deliberations to inquire if "impaired" judgment is necessarily contributory negligence. That the error influenced the jury is quite plain because the police report is the only place in the record where the word "impaired" appears.

The Court of Appeals opinion states that "the rule with respect to the admissibility of information in the police report which is garnered from other persons is somewhat unclear." There are no decisions of the Supreme Court stating the rule, and the Circuits have come to conflicting conclusions. The guidelines in *Hoffman v. Palmer* (1942), 318 U. S. 109, dealing with a locomotive engineer's statement, are not being followed.

II. Whether the summation of respondent's counsel in accusing petitioner's counsel of doctoring an exhibit to "fool" the jury and in accusing him of suppressing police photographs comply with proper standards for trying a civil case under the guidelines set down in *N. Y. Central R. R. Co. v. Johnson*, 279 U. S. 310 at 318.

There is no recent restatement of the proper standards for civil cases, while there is a recent restatement in the criminal case of *Chapman v. California*, 386 U. S. at page 24.

III. Where the Court of Appeals holds that the Court's charge was in error in that the jury was instructed that contributory negligence "in any degree" requires a defendant's verdict, can such an error be disregarded as harmless?

Statutes Involved.

28 U. S. C. §1732. Record made in regular course of business; photographic copies.

"(a) In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence or event or within a reasonable time thereafter.

"All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.

"The term 'business,' as used in this section, includes business, profession, occupation, and calling of every kind."

(b) [Omitted.]

28 U. S. C. §2111. Harmless error.

"On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment, after an examina-

tion of the record without regard to errors or defects which do not affect the substantial rights of the parties."

Statement of the Case.

On Saturday night, after midnight, on September 4, 1960, during the Labor Day week-end at Cape Cod, Massachusetts, a private car traveling east owned by the respondent, and operated by Terry Nardin collided with a pedestrian, David Juaire, on a fairly straight and fairly level road, which ran in a east-west direction. There were frequent rest areas and tables for picnicking along the side of the road (57a). The road was straight and level for several hundred feet (37a, 61a). It was a two-lane road, 19 feet six inches wide (16a), and while there were no street lights, a full moon, or a nearly full moon made the road and its surroundings fairly visible, in fact, quite bright (60a). The plaintiff testified that he and two friends, one female, had come from Providence, Rhode Island, earlier that day to spend the week-end in Cape Cod (31a). They had arrived at noon, had lunch at the beach and walked around all afternoon visiting shops and art stores in Provincetown (31a). They then had dinner at a picnic area, sharing a picnic table with two families (31a) and then went back into town for entertainment. They tried a number of places, which were crowded, and they couldn't get in (32a), finally entered a night club called the Atlantic House, where they listened to a jazz band until the place closed at midnight (32a). He further testified that during the day he had had one beer with his lunch and earlier that evening, over a 2½-hour period, less than three bottles of beer (32a) at the night club. After leaving the night club they had coffee, and then Mr. Juaire had an argument with the girl, because she insisted they drive back to Providence that night, a four-hour trip (33a). He tried to convince her not to go back that

night, because they had been up all day, and it was a late hour. When she could not be convinced, he insisted on being let out of the car (33a).

He got out at one of the rest areas mentioned, and after walking to one end of it, was about to cross the road when he tripped on its shoulder and fell into the road onto his hands and knees, feeling both surprised and stunned.

When Mr. Juaire saw lights coming he got up and stepped back off the road and was actually on the shoulder when he was struck. It all happened so quickly that he did not have time to get further out of the way (35a-37a).

All the witnesses agree that when first seen (35a, 37a, 60a), Mr. Juaire was in some distress, for he had fallen into the roadway and was variously described as almost prone (57a), semiprone (60a), on hands and knees, but in any event pretty stationary (57a). In this prone position, perpendicular to the road, his feet were on the shoulder of the road, and the rest of his body occupied less than half of the lane in which defendant's vehicle was traveling (58a).

According to these witnesses, he was rising up, and had reached about his knee, his head was upright facing the car, with one or both hands upraised in a futile attempt at self-defense, when he was struck by the defendant's car. This car was identified by an independent witness as speeding in excess of the legal limit (60a, 22a).

The defendant's operator, Mr. Nardin, attempted to excuse his failure to see Mr. Juaire and avoid the accident by testifying that immediately prior to the point at which the accident occurred, there is a small rise in the road which prevented Mr. Nardin from seeing Mr. Juaire until it was too late. He admitted that the rise could not be more than one percent (61a).

The police officer testified he found Mr. Juaire lying nearly parallel to the road, approximately 2½ to 3 feet off the road, with his head east and his feet west, at the eastern end of a clearing approximately 100 feet wide. The clearing is used by campers, and is sufficiently large to park two or three cars off the road. It is a sandy area (16a). He took photographs and measurements (17a). Exhibit 5 is a photograph he took showing the damaged right front headlight of defendant's car. All the glass is missing. He found no pieces of glass in the roadway in the place where Nardin claimed to have struck Mr. Juaire (23a).

We finally mention the testimony of Dr. Smith, a physician who treated Juaire immediately after the accident. He described the injuries as compound fractures of both long bones of his right forearm and compound fractures of long bones in his right leg (29a), with a portion of the muscle dead and one bone fragment protruding (29a) and displaced at least one to one and one-half inches (29a). The leg had a gaping wound about six and a half inches long (30a), surrounding the leg, exposing muscle, fascia and tendons. That is why the doctor testified:

> "You could put your hand down inside the wound on one side and down inside the wound on the other side, and the skin and fat were completely torn away from the underlying muscle" (30a).

Significantly, he described the injury as one that could only be caused by the automobile tire, as it rolled over his leg (30a).

> "• • • that is the only mechanism I know that can tear the skin and fat away from the deep surface" (30a).

Thus, the type of injury supported Juaire's claim that he was struck while he was on the shoulder, at the place where he was found. The serious and crippling injuries

(8a-11a), render it highly improbable that he moved at all following the impact. Thus, Nardin's claim that Juaire was on the roadway when he struck him must be considerably discounted.

The police officer arrived on the scene shortly after, did not speak to petitioner, but spoke to the driver Nardin, and others. He rendered an official report which was never introduced. The police report that was introduced (Exhibit B) was described by the police officer as containing tentative information to continue with his investigation, but it was not the official one (20a).

This report was used by respondent's counsel during final argument to establish that petitioner, while almost dead drunk, was crawling on a highway when struck and that after a police investigation the driver was not charged with any violation of law. None of the eyewitnesses testified that petitioner was crawling, or that he was drunk, or that his ability was impaired, and rather than no violation being found, the driver was charged with reckless driving.

The basis for federal jurisdiction in the court of first instance is diversity of citizenship of the parties.

Reasons to Allow Writ.

I. The Court of Appeals decision in this case allowing the police report into evidence as a business record pursuant to 28 U. S. C. §1732 is in conflict with the First Circuit decision of *Gencarella v. Fyfe*, 171 F. 2d 419, which held it to be reversible error to admit a police report. The divergence of opinion is spelled out in Judge Tenney's discussion in *Yates v. Bair Transport, Inc.*, 249 F. Supp. 681 (S.D.N.Y. 1965).

This Court has never heretofore rendered a decision on the admissibility of police reports as business records. This is a frequently recurring problem in all courts. Even the Second Circuit stated the rule was unclear. Its decision is in conflict with *Hoffman v. Palmer,* 318 U. S. 109, which set forth the guidelines for business records admissible pursuant to 28 U. S. C. §1732.

II. The respondent's attorney accused petitioner's attorney of doctoring an exhibit, and of trying to fool the jury. Such conduct has been condemned by this Court in *N. Y. Central R. R. Co. v. Johnson,* 279 U. S. 310. The Court of Appeals in this case found the accusation "probably false," nevertheless found no error in such an accusation. The respondent's attorney implied that petitioner's attorney suppressed photographs taken by the police, referred to him as "an innocent lawyer who doesn't know how to try a case," and injected his personal belief into the case. This case contained a baedeker of improper conduct, and the affirmance by the Court of Appeals opens the door to others who might be tempted to follow the example. While the Court of Appeals found some "outrageous" statements, nevertheless, held them "harmless." Counsel and the Courts should have a current expression of this Court's views on the conduct of a civil case.

At the same time this Court should review 28 U. S. C. §2111. This section was intended to uphold a judgment when mere technical errors were committed. The opinion of the Court of Appeals in this case reports *seven* instances of error, including a misleading charge, but concludes the errors were not such as to require a new trial.

Wherefofe, it is respectfully requested that this writ be granted.

ALBERT AVERBACH,
Attorney for Petitioner,
50 Broadway,
New York, N. Y. 10004

On the Petition:

Sol Lefkowitz,
Pierre Lorsi.

APPENDIX.

Police Report of Motor Vehicle Accident.

(See opposite page.) ☞

CASE NO. [redacted]

The Commonwealth of Massachusetts
POLICE REPORT OF MOTOR VEHICLE ACCIDENT

(Sign and Mail to: REGISTRY OF MOTOR VEHICLES, 100 Nashua Street, Boston 14, Mass.)

TIME — **DATE of accident** ..... Day ..... Hour ..... A.M. P.M.

LOCATION

PLACE where accident occurred: PROVINCETOWN (City or Town) BARNSTABLE (County)

Road on which accident occurred: RTE. 6A (Give name of street or highway)

☐ At its intersection with ..... OR

☒ Not at intersection: 2000 Feet S (N ⑤ W) of BRAND VIEW HILL (Name of intersecting street) (Give nearest intersection, street, highway, bridge, R.R.X., other identifying landmark)

ACCIDENT involved collision with:

- ☒ Pedestrian
- ☐ Motor Vehicle
- ☐ R.R. Train
- ☐ Street Car
- ☐ Animal Drawn Vehicle
- ☐ Bicycle
- ☐ Animal
- ☐ Fixed Object
- ☐ Other Object
- ☐ Overturned in Roadway
- ☐ Ran Off Roadway
- ☐ Other Non-Collision (Explain in remarks)

DO NOT WRITE IN THIS SPACE

☐ PD ☐ NFI ☐ FI

Type .....

	Op. No. 1	Op. No. 2
Reason		
Points		
Reason		
Points		

By .....

VEHICLES — Total vehicles involved: 1

VEHICLE No. 1 M ☒ Sex F ☐

Operator: TERRY W. NARDIN

Street Address: 12 SAGAMORE RD. City: EAST NORWICH, NEW YORK

Lic. No. 5484290 N.Y. Restriction: NONE

Issued: 1-19-59 Date of Birth: 12-19-42 Yrs. Driving: .....

Owner: WALTER MARSHAK INC.

Street Address: RIDGEROCK LANE City: EAST NORWICH N.Y.

Reg. No.: GN8043 Make & Type: FORD - 2DR SEDAN

Date Issued: 1-12-60

Parts of Vehicle Damaged: RT. HEADLIGHT

Approx. cost to Repair $: 50.00

VEHICLE No. 2 M ☐ Sex F ☐

Operator .....

Street Address ..... City .....

Lic. No. ..... Restriction .....

Issued ..... Date of Birth ..... Yrs. Driving .....

Owner .....

Street Address ..... City .....

Reg. No. ..... Make & Type .....

Date Issued .....

Parts of Vehicle Damaged .....

Approx. cost to Repair $ .....

Damage to property other than vehicles .....

(Name object, show ownership and state nature of damage)

Approx. Repair Cost $ .....

INJURED — Total injured: 1

Name: DAVID JUAIRE Address: 135 PROSPECT ST. / PROVIDENCE, R.I.

Age: 18 Sex: M Part of Body Injured: LEG & ARM ROAD Nature of Injuries: COMPOUND FRACTURES LEG & ARM FRACTURED SKULL Was person killed? NO

First Aid rendered: Yes ☒ No ☐ Medical attention: Yes ☒ No ☐

Operator ☐ Passenger ☐ Pedestrian ☒ Occupant In Veh. No. ☐ Other (Specify) ☐

Name ..... Address .....

Age ..... Sex ..... Part of Body Injured ..... Nature of Injuries ..... Was person killed? .....

First Aid rendered: Yes ☐ No ☐ Medical attention: Yes ☐ No ☐

Operator ☐ Passenger ☐ Pedestrian ☐ Occupant In Veh. No. ☐ Other (Specify) ☐

PEDESTRIAN was going: SOUTH EAST (North, East, etc.) On ☐ RTE 6A (Street, etc.) From NORTH WEST (North side to East side, etc.) To SOUTH WEST

Across ☒

(Check at least one item in first three columns)

- ☐ Crossing at intersection—with signal
- ☐ Crossing at intersection—against signal
- ☐ Crossing at intersection—no signal
- ☐ Crossing at intersection—diagonally
- ☐ Crossing between intersections
  - ☐ On crosswalk
  - ☒ Not on crosswalk
- ☐ Coming from in front or back of parked cars
- CROSSING in roadway (check Two)
  - ☒ With traffic
  - ☐ Against traffic
  - ☐ Sidewalks available
  - ☒ Sidewalks not available
- ☐ Standing in safety zone
- ☐ Getting on or off street car
- ☐ Getting on or off other vehicle
- ☐ Pushing or working on vehicle
- ☐ Other working in roadway
- ☐ Playing in roadway
- ☐ Hitching on vehicle
- ☒ Lying in roadway
- ☐ Not in roadway

(Check pertinent items)

Crosswalk marked? ☐ Yes ☒ No

Pedestrian inside markings or extension of sidewalk lines? ☐ Yes ☒ No

WHAT OPERATORS WERE DOING

Operator (Check one for each operator)

1	2	
☒	☐	Going straight ahead
☐	☐	Making right turn
☐	☐	Making left turn
☐	☐	Making U turn
☐	☐	Slowing or stopping
☐	☐	Starting in traffic lane
☐	☐	Start. from parked position
☐	☐	Stopped in traffic lane
☐	☐	Parked ☐ ☐ Backing

(Check applicable items)

☐	☐	Passing or overtaking
☐	☐	Avoiding vehicle, object, pedestrian
☐	☐	Skidded—before braking
☐	☐	Skidded—after braking
☐	☐	Driverless moving vehicle

OPERATOR VIOLATIONS

Vehicle 1	Vehicle 2	(Check one or more for each vehicle)	Vehicle 1	Vehicle 2	
☐	☐	Operating under influence	☐	☐	Disregarded police officer
☐	☐	Exceeding lawful speed	☐	☐	Disregarded traffic lights
☐	☐	Did not have right of way	☐	☐	Disregarded warning or stop signs
☐	☐	Failed grant R of W to pedestrian	☐	☐	Improper starting from parked position
☐	☐	Following too closely	☐	☐	Improper parking location
☐	☐	Passing on hill	☐	☐	Other improper action (explain)
☐	☐	Passing on curve	☐	☐	Leaving scene of accident
☐	☐	Other improper passing	☐	☐	Failed to stop for school bus
☐	☐	On wrong side of road	☐	☐	Failed stop for blind person
☐	☐	Failed to signal or improper signal	☐	☐	Operating on high beam
☐	☐	Improper turning	☒	☐	No violation

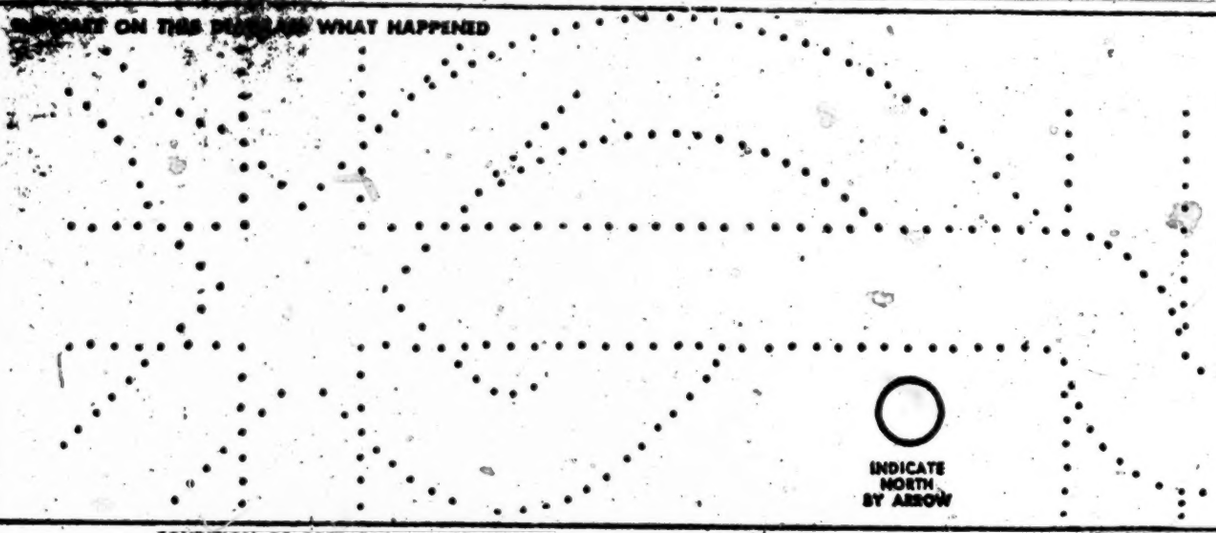
Amplify or specify violation not listed .....

SPEED

(Fill in all items for each vehicle)	Vehicle 1	Vehicle 2
1. Distance danger first noticed (ft.)	80	
2. Estimated speed at that time	25 MPH	
3. Estimated speed at moment of accident	25-35 MPH	
4. Distance vehicle traveled after impact	356'	
5. Posted speed limit	40	
6. Maximum safe speed for prevailing conditions	40	

E65L. 150m-2-57-6625-3-57-919809

REPORT ON THIS PAGE WHAT HAPPENED



INSTRUCTIONS FOR USE OF DIAGRAM:

1. Draw solid lines to indicate scene of accident using dotted outline as guide wherever suitable.
2. Number each vehicle and show direction of travel by arrow.
3. Use solid line to show path of vehicle before accident, broken line after accident.
4. Show pedestrian by:
5. Show railroad by:
6. Show distances and direction to landmarks; identify by name and number.
7. Indicate NORTH by arrow in circle.

CONDITION OF OPERATOR AND PEDESTRIAN
(Check one or more)

Operator 1	2	Ped.		Operator 1	2	Ped.	
☐	☒	☐	Ill	☐	☐	☐	Wearing glasses
☐	☐	☐	Fatigued	☐	☐	☐	Had not been drinking
☐	☐	☐	Apparently asleep	☐	☒	☐	Had been drinking. If so,
☐	☐	☐	Defective eyesight	☐	☐	☐	A. Obviously drunk
☐	☐	☐	Defective hearing	☐	☒	☐	B. Ability impaired
☒	☐	☐	Apparently normal	☐	☐	☐	C. Ability not impaired
☐	☐	☐	Condition unknown	☐	☐	☐	D. Unknown whether impaired
☐	☐	☐	Other defects	☐	☐	☐	Unknown whether drinking

VEHICLE CONDITION

Vehicle 1	2		Vehicle 1	2	
☐	☐	Defective brakes	☐	☐	Defective steering mechanism
☐	☐	Defective hand brake	☐	☐	Defective windshield wiper
☐	☐	Improper tail lights	☐	☐	Other defects
☐	☐	Improper lights	☒	☐	No defects
☐	☐	Defective tires	☐	☐	Not known (explain in remarks)

OPERATOR VISION OBSCURED
(Check one or more for each section)

Vehicle 1	2		Vehicle 1	2	
☐	☐	Rain, snow, etc. on windshield	☐	☐	Trees, crops, etc.
☐	☐	Windshield otherwise obscured	☐	☐	Building
☐	☐	Vision obscured by load on vehicle	☐	☐	Embankment
☒	☐	ONCOMING CARS LIGHTS AND DUST (Specify other)	☐	☐	Signboards
☐	☐	Vision not obscured	☒	☐	Hillcrest (SLIGHT)
			☐	☐	Parked cars
			☐	☐	Moving cars
			☐	☐	..... (Specify other)
			☐	☐	Vision not obscured

ROAD CHARACTER
(Check one)

- ☒ Straight road
- ☐ Sharp curve or turn
- ☐ Other curves
- ☐ Cloverleaf grade
- ☐ Traffic circle

Vehicle 1	2	(Check one for each vehicle)
☐	☐	Level road
☐	☐	Up grade
☒	☐	Hillcrest (SLIGHT)
☐	☐	Down grade

ROAD SURFACE
(Check one)

- ☐ Concrete
- ☒ Blacktop
- ☐ Brick
- ☐ Gravel
- ☐ Dirt or sand
- ☐ ..... (Specify other)

ROAD CONDITIONS

(Check one)
- ☒ Dry
- ☐ Wet
- ☐ Muddy
- ☐ Snowy
- ☐ Icy

(Check one or more)
- ☐ Defective shoulders
- ☐ Holes, deep ruts
- ☐ Loose material on surface
- ☐ Other defects
- ☒ No defects

(Explain fully in remarks)

- ☐ Road under construction
- ☐ Detour

TRAFFIC CONTROL
(Check one or more)

- ☐ Officers or watchman
- ☐ Stop & Go light or signal
- ☐ Stop sign
- ☐ Warning sign or signal
- ☐ R.R. crossing gates
- ☐ R.R. automatic signal
- ☐ ..... (Other)
- ☐ Control device not functioning
- ☒ No control present

KIND OF LOCALITY
(Check one)

- ☐ Business
- ☐ Residential—thick
- ☐ Residential—thin
- ☒ Sparse (country)
- ☐ Parkway
- ☐ Toll way
- ☐ Private drive or grounds

LIGHT
(Check one)

- ☐ Daylight
- ☐ Dusk
- ☐ Dawn

Darkness with:
- ☐ St.-Highway lighted
- ☒ St.-Highway not lighted

WEATHER
(Check one)

- ☒ Clear
- ☐ Cloudy
- ☐ Fog
- ☐ Raining
- ☐ Snowing
- ☐ Sleet
- ☐ Mist
- ☐ ..... (Other)

ROAD WIDTHS AND LANES

Width of pavement or road surface for vehicle traffic..... ft.
Additional width of shoulders..... ft.
Total No. lanes... 2
Were lanes marked? ☒ Yes ☐ No
Were opposing lanes separated?
☐ Yes ☒ No.
By what?.....
Was it a one-way street?
☐ Yes ☒ No.

WITNESSES:

Name:..... Address:.....

Name:..... Address:.....

Name:..... Address:.....

Describe what happened. (Make statement covering points of importance not mentioned before in this report and explain questions not fully answered by marking boxes.) Use additional sheets if necessary.

.....

.....

.....

.....

INVESTIGATION:

Time notified of accident..... A.M. P.M.
Arrests or Complaints: (Date) (Time)

Investigation made at scene? Yes ☐ No ☐

Name..... Charge(s).....

Name..... Charge(s).....

Recommendations, if any.....

SIGNATURE:..... (Name and Rank) (Department) (Date of Report)

Opinion.

(See opposite pages.) ☞

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 381—September Term, 1967.

(Argued April 3, 1968 Decided June 4, 1968.)

Docket No. 31646

DAVID JUAIRE,

Plaintiff-Appellant,

—v.—

TERRY W. NARDIN,

Defendant,

—and—

WALTER MARSHAK, INC.,

Defendant-Appellee.

Before:

MOORE, WOODBURY* and SMITH,

Circuit Judges.

Appeal by plaintiff from defendant's verdict and judgment in motor vehicle negligence personal injury action in the United States District Court for the Southern District of New York, John F. X. McGohey, *Judge*. Affirmed.

* Of the First Circuit, sitting by designation.

SOL LEFKOWITZ, New York City (Albert Averbach, Seneca Falls, N. Y., on the brief), *for plaintiff-appellant.*

ABRAHAM SHAPIRO, New York City (Gold & Lerner, and Weisman, Celler, Allan, Spett & Sheinberg, New York City, on the brief), *for defendant-appellee.*

SMITH, *Circuit Judge*:

Plaintiff, David Juaire, appeals from a verdict and judgment for defendant Walter Marshak, Inc., in the District Court for the Southern District of New York, John F. X. McGohey, *Judge*, in a motor vehicle negligence personal injury action in which jurisdiction is based on diversity of citizenship. The principal grounds urged for reversal are prejudicial conduct of defendant's counsel, error in admission of police reports and error in the charge and supplemental charge. We find no reversible error and affirm the judgment.

At about 1:00 a.m. on September 4, 1960, Terry Nardin was driving appellee's car on Route 6A near Provincetown, Mass. when he collided with a pedestrian, plaintiff David Juaire, who was lying or crawling on or near the highway. The two lane road, just under 20 feet wide, was straight and almost level. There were no street lights but the moon was full. Plaintiff testified that he had come to Cape Cod from Providence, R. I. in Rosemary Trainor's car to spend the weekend with 26-year old George Holland and 21-year old Rosemary. Juaire was only 18 years old. They had lunch at a beach, walked around Provincetown and then went to a picnic area, and in the evening went to a night club where they stayed from about 9:00 to midnight. They then had some coffee and there was some discussion about

where to spend the night. Rosemary wanted to return to Providence but plaintiff wanted to stay because the trip was too long. In any event, Holland drove the car and when they got to a rest area about 2½ miles out of Provincetown Juaire got out of the car and the car pulled away. He walked to the end of the rest area and started to cross the highway when he tripped and fell into the road on his hands and knees. He saw lights coming from the right so he got up and then saw lights not more than 100 feet away coming from the other direction. He says that he stepped off the road on to the shoulder and while standing there was hit by the car and landed on the shoulder.

Nardin was travelling easterly between 25 to 30 or 30 to 40 MPH in a 40 MPH zone and had just proceeded, according to his testimony, up a small rise when he and his passenger, now his wife, observed plaintiff directly in front of them, apparently rising up from a position on his hands and knees in the center of the eastbound lane. Nardin slammed on his brakes and swerved to the left, but plaintiff was struck by the front right side of the car and knocked off the road to the right. Nardin testified that there was a hill just before the place of the accident which prevented him from seeing plaintiff. This was supported by the police reports which in describing the road character, stated "Hillcrest (slight)," and by the photographs in evidence. It is contested by the plaintiff who asserts that the road was essentially flat. Although it is not pointed out in either of the briefs, the evidence also supports that a car coming from the opposite direction passed at about the same time, and might have decreased Nardin's vision.

The testimony of Nardin was corroborated in most of the essential details by two eye-witnesses, his passenger, Mrs. Jane Baron Nardin (married since the accident), and by Thomas B. Kinraide, who had observed the plaintiff prone

or on his hands and knees in the middle of the eastbound lane of the highway while he was riding in a car going in a westerly direction. He also noticed the headlights of a car coming from the opposite direction and as his car passed the figure on the road, he saw defendant's car swerve to the left and stop. Kinraide's car made a U-turn and then he observed the plaintiff lying on or very near the shoulder.

On cross-examination plaintiff testified that he had picked up a six-pack of canned beer at a supermarket before lunch and drank one can at lunch. Rosemary and Holland each had two at lunch and the sixth can was not accounted for. That evening at the night club, plaintiff had 2½ bottles of beer and Rosemary had a gin drink. He denied that Rosemary was drunk but admitted that at a prior traffic hearing he had testified that Rosemary was very, very drunk, they had a big argument and he got out of the car. He stated that it was his intention to walk back to town from the place he got out of the car.

The police reports, based on Officer Christopher's observation of the scene and his interviews with Nardin and Kinraide at the scene, stated that the plaintiff was crawling on the roadway and had been drinking so that his ability was impaired. They also stated that Nardin was going 25-35 miles per hour in the 40 MPH zone and travelled 35 feet after the impact.

The only testimony that Nardin might have been exceeding the speed limit came from Kinraide, who testified that the car in which he was a passenger was probably going from between 40 and 50 MPH and that the defendant's car, coming from the opposite direction, was going approximately the same rate. However, he was not watching the speedometer in the car in which he was riding and was not in a very good position to make an accurate estimate of the speed of the oncoming car.

Kinraide also could not recall the odor of plaintiff's breath but had signed a statement in his own handwriting on September 25, 1960 (three weeks after the accident), which refreshed his recollection that his impression at the time was that he smelled alcohol at the scene of the accident.

Dissatisfied with Exhibit 3, an official map or profile of the road which employed two different scales—1″ = 8′ for elevation and 1″ = 40′ for all other measurements—plaintiff's counsel, Lefkowitz, had someone draft Exhibit 3-A, a map apparently purporting to use the same scale for all measurements which appears in the original 3-A to be about 1″ = 11′.

In his summation to the jury, defendant's counsel, Hauptman made the following argument.

> Mr. Hauptman: Exhibit 3-A, which purports to be an enlargement of Exhibit 3. Notice what kind of an enlargement it is, gentlemen and madam. You notice the width of the road here (indicating)?
>
> Look at the width of the road there (indicating). Much larger.
>
> Look at the bottom part that is supposed to be a profile of the road. Do you notice the profile of the road compared to the width of the road? Do you see that, gentlemen? And why is it at least three times the width?
>
> But on the proposed enlargement do you see what he did? He made the profile one quarter the size and enlarged the road area, this innocent lawyer who doesn't know how to try a case, and this is supposed to fool you.
>
> The Court: Please. Don't—
>
> Mr. Lefkowitz: I object to this, your Honor.

It is doubtful that Exhibit 3-A was intended to fool anybody; nor is it likely that it is inaccurate. Exhibit 3-A changed both scales and consequently, although the overhead sketch of the road in 3-A is wider, it appears to be in scale with the rest of 3-A. Thus, Hauptman's accusation is probably false. The presence of the two exhibits is, however, very confusing. Lefkowitz did not use an expert to introduce 3-A and because 3-A contains no legend indicating the scales, the responsibility for the confusion is probably his. Consequently, we cannot say that Hauptman's accusation constitutes unfair comment.

Hauptman's sarcastic reference to Lefkowitz as an "innocent lawyer who doesn't know how to try a case," while intemperate and improper, is not as outrageous as it seems at first blush and out of context. The record is replete with improper conduct on the part of Lefkowitz. On three occasions, Lefkowitz made fawning remarks about his own ineptitude as a lawyer, apparently for the purpose of currying favor and eliciting sympathy from the jury. In addition, on three other occasions, the court admonished Lefkowitz (in the absence of the jury) for his facial expressions of helplessness, and his gestures, following adverse rulings. In light of Lefkowitz' self-deprecating airs of ineptitude and naiveté, Hauptman's sarcastic remarks were harmless. While the record suggests that the jury could well have found Lefkowitz' performance undesirable, Hauptman probably added little to the impression Lefkowitz himself created.

Appellant also contends that Hauptman used language during summation which implied that Lefkowitz had suppressed police photographs of the accident. In fact, however, Hauptman accused only the witness Christopher (a former police officer) of concealing the whereabouts of the photos. It is difficult to decide from the record whether

Christopher's answers to questions about the location of the official original police records were clearly false, merely coy, or clearly honest, but Hauptman's argument in summation that Christopher was less than candid and impartial was permissible and not without support in the record. If the arguments are properly made as to Christopher, then the fact that they could also indirectly reflect on Lefkowitz do not render them improper. The appendices do not contain any direct suggestion by Hauptman that Lefkowitz was responsible for Christopher's lack of candor, although the jury could possibly have drawn such an inference.

During his summation, Hauptman stated:

> "Now one thing I want to make clear. I want to say it now and get it out of the way. There is no doubt that the vehicle struck this man. There is no doubt about that at all. There is no doubt that he had some severe injuries, no doubt about that.
>
> But I think, and I mention this, please, because I talk about it, *don't get the idea that I feel you should give him money, because, honestly, as sincerely as I can, I don't think he is entitled to a nickel.*"

From the context in which the italicized portion appears, it seems clear that the opinion expressed, although perhaps improper, was very insignificant and completely harmless. See *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 240-42 (1940), cited by appellant, which indicates that isolated and casual statements, although improper, are not prejudicial if they do not reflect the quality of the argument as a whole.

The police report which was received in evidence indicated that the police officer who prepared the report (Christopher) found that the driver Nardin had not committed any violation of the traffic laws, and on three occasions,

Hauptman referred to this aspect of the police record. Appellant argues that Hauptman in fact knew that there had been a traffic hearing on an alleged violation and that the reference to the police report was thus serious and misleading conduct.

The briefs and appendices reflect occasional references to some hearing in Barnstable, Mass., but do not indicate what questions the hearing involved or what conclusions were reached. Thus, this argument at best appears to be unsupported by facts. Moreover, Christopher was available and could have testified about the hearing if the plaintiff had so wished.

Appellant contends references to insurance were improper. There was never any direct suggestion that the appellee was insured. The first references to insurance came in answers to questions asked by the court of two witnesses, including the witness Christopher. In summation, Hauptman accused Christopher of injecting insurance into the case so that the jury would grant recovery to the plaintiff. This accusation, appellant argues, prejudiced his case.

However, the fact that this accusation deals with the magic word insurance is of no particular significance. The injection of insurance into the case would appear to harm no one but the defendant.

The accusation against Christopher was a proper subject for argument in summation. Hauptman was seeking to counteract any harm done by Christopher's reference to insurance by exposing what he thought was the motive behind the reference. The jury heard Christopher's testimony and could judge for itself whether Christopher was unfairly accused. Indeed, it seems likely that Hauptman's clear reference to insurance aided the case more than the accusation harmed it. The prior reference was slight and tangential, and the court directed the jury to disregard it.

The objection to the admission of the police report is not well taken. The two copies of the police report, Exhibits B and I, concededly contain identical information, Exhibit B in Christopher's handwriting and Exhibit I mostly in his typing. Thus, if the admission of either was proper, the admission of the other was not prejudicial. The report presents hearsay problems at two levels, the reporter level and the declarant level, but neither of these problems required the exclusion of the report.

At the reporter level, it is established that Christopher prepared Exhibit B in his own handwriting and that he typed out Exhibit I himself. At one point Christopher stated: "Everything in this exhibit is my doing." Although it is unclear whether he was referring to Exhibit B or Exhibit I, it is of no importance since they contain identical information.

Exhibits B and I were identified by Christopher as the reports of the accident prepared by him on police forms, and which were kept in the police files. The court below found, and properly, that the records constituted admissible documents under 28 U. S. C. A. §1732 and CPLR Rule 4518, the applicable codifications of the business record exception to the hearsay rule at the reporter level. See *Hawkins* v. *Gorea Motor Express, Inc.*, 360 F. 2d 933 (2 Cir. 1966) (*per curiam*); *Salsberg* v. *Modern Transfer Co.*, 324 F. 2d 737, 738 (2 Cir. 1963).

Moreover, the pretrial order stipulated that the police records of the accident "are authentic and may be offered in evidence." In addition, the gravamen of the hearsay objection is that the reporter or the declarant is not subject to cross examination on the foundations for the statements in the report which are attributed to him. Since in this case Christopher was present and available for cross-examination as to any item on the report, there is no reason to

exclude the police report for hearsay at the reporter level in any case. *Central RR Co.* v. *Jules S. Sottneck Co.*, 258 F. 2d 85 (2 Cir. 1958). Indeed, Christopher was in fact examined regarding the basis for most of the statements which arguably harm the plaintiff's case, and in several instances, he acknowledged that the statements were not based on his own observation.

This brings us to the problems about the hearsay at the declarant level. Christopher stressed the fact that much of the information reflected in the report was garnered from Terry Nardin, the driver of the defendant's car. Particularly harmful to the plaintiff's case was the information in the report that the plaintiff was crawling on the highway and that plaintiff had been drinking and his ability was thus impaired.

The rule with respect to the admissibility of information in the police report which is garnered from other persons is somewhat unclear. Probably, however, the best rule is that if the original source (the declarant) is not under a duty to tell the truth, or if the statement of the declarant does not itself come under some established hearsay exception, e.g., *res gestae*, admission against interest, etc., then the police report containing that information is inadmissible. See Judge Tenney's discussion in *Yates* v. *Bair Transport, Inc.*, 249 F. Supp. 681 (SDNY 1965).

However, even if the police report is inadmissible for the reasons given by Judge Tenney in *Yates*, its admission in this case was not reversible error. In the instant case, the declarants on whose statements the police report was based (Nardin, Kinraide, and Mrs. Nardin) were witnesses in the case and available for cross-examination on the subject of their statements to Christopher. Indeed, both the issue of plaintiff's inebriation and of his crawling on the highway were thoroughly litigated at the trial and the jury

was fully aware of the limited observation on which the Nardins and Kinraide based their statements; the jury was also aware of Nardin's possible bias in the case as the driver of the defendant's car and a potential defendant himself at the time he made the statements to Christopher.

During the course of deliberations the jury sent the following note to the Court:

> "May we have a ruling as to whether or not poor or improvident, impaired judgment is necessarily contributory negligence."

The Court decided that the best answer to that question was again to define negligence:

> "Now I think that I can only answer that by repeating the definition of negligence.
>
> It is either doing something which a reasonably prudent person under a set of circumstances would not do, or it is the failure to do something under a set of circumstances—given the set of circumstances—which a reasonably prudent person in those circumstances would do.
>
> I think that is it. You may return to the jury room."

The appellant contends that it was reversible error for the court to refuse his request that the question be answered by a simple "No." We do not agree.

"No" could mean either that the jury may not have a ruling, or that impaired judgment was not necessarily contributory negligence, but it is clear that the appellant wanted the court to state the latter.

Even though the court could have correctly stated that impaired judgment is not necessarily contributory negligence, it was not error under the circumstances to give a

general definition of negligence. In essence, the judge's definitional response meant "No, not necessarily. You must decide for yourself whether the impaired judgment here constituted contributory negligence according to the following standard."

Appellant asserts that prejudicial error was committed when the court summarized its previous instructions and said that the jury must determine if some negligence of the defendant was a *substantial cause* of the injury to the plaintiff and if the plaintiff's negligence contributed *in any degree to the accident.*

The appellant concedes that the judge correctly stated earlier in his charge the rules concerning the interrelationship of negligence and contributory negligence but asserts that the later summarization confused the jury.

The court correctly charged that the *standards* of negligence by which the conduct is to be measured is the same for the plaintiff and the defendant, but the court never stated clearly that the standard of *causation* is the same.

Professor Prosser has addressed himself to this confusing area of the law.[1]

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1 There is one rather curious but not infrequent aberration which makes an apparent distinction between negligence and contributory negligence. It is said by a number of courts[42] that the plaintiff is barred from recovery if his own negligence has contributed to his injury "in any degree, however slight." On the face of it this means that any insignificant contribution, such as the addition of a lighted match to a forest fire, would bar the action. In all probability this is nothing more than a confusion of words, which fails to distinguish slight negligence from slight contribution; and what is really meant is that the plaintiff's negligence can be a defense, no matter how slight his departure from ordinary standards of conduct. The intent, in other words, is to reject any idea of comparative negligence. If so, it is a mistake peculiarly likely to mislead the jury when an instruction is given in such terms. Most courts, when the distinction has been pointed out to them, have held that the rules as to causation[43] are the same for contributory negligence as for negligence,[44] and that the plaintiff

The court, in its charge, expressed the idea that the jury should find for the defendant if the plaintiff's negligence contributed to the accident *in any degree*, even though they may have found that the defendant's negligence caused the accident *in a substantial way*.

There are several factors which militate against reversing this case on the basis of this charge:

(1) There is language in the charge which instructs the jury that the plaintiff's negligence to bar recovery must have caused or brought about the accident.

(2) The objections of plaintiff's counsel to the charge, while flagging the general area of discontent, did not indicate the error with respect to causation with sufficient specificity to show the judge what was desired in order to correct the possibly misleading charge.

(3) The nature of the evidence was such that if the plaintiff was negligent as claimed, it is hardly conceivable

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is not barred unless his negligence, of whatever degree, has been a substantial factor in causing his injury.[43]

42 *Crane* v. *Neal*, 1957, 389 Pa. 329, 132 A. 2d 675; *Ferris* v. *Patch*, 1956, 119 Vt. 274, 126 A. 2d 114, 63 A. L. R. 2d 103; *Aitchison* v. *Reter*, 1954, 245 Iowa 1005, 64 N. W. 2d 923; *Silva* v. *Waldie*, 1938, 42 N. M. 514, 82 P. 2d 282; *Keck* v. *Pozorski*, 1963, —— Ind. App. ——, 191 N. E. 2d 325.

43 See *supra*, p. 244.

44 Restatement of Torts, §465.

45 *Mack* v. *Precast Industries, Inc.*, 1963, 369 Mich. 439, 120 N. W. 2d 225; *Reep* v. *Greyhound Corp.*, 1960, 171 Ohio St. 199, 168 N. E. 2d 494; *Huey* v. *Milligan*, 1961, 242 Ind. 93, 175 N. E. 2d 698; *Busch* v. *Lilly*, 1960, 257 Minn. 343, 101 N. W. 2d 199; *Smirnoff* v. *McNerney*, 1930, 112 Conn. 421, 152 A. 2d 399; *Farmer* v. *Central Mut. Ins. Co. of Chicago*, 1937, 145 Kan. 951, 67 P. 2d 511; *Devine* v. *Cook*, 1955, 3 Utah 2d 134, 279 P. 2d 1073.

Accord: Restatement Second, Torts, §465, Comment (b).

that his negligence was not a substantial factor in causing his injuries.

While the charge might have been improved upon, as we have indicated, we are persuaded that the error was not such as to require a new trial.

The judgment is affirmed.